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COMPENSATION FOR MOVING EXPENSES OF PERSONAL PROPERTY IN EMINENT DOMAIN PROCEEDINGS

The rule that the owner of condemned property is not entitled to compensation for the cost of moving personal property from premises that have been condemned has been repeatedly sustained by the overwhelming majority of the cases involving eminent domain proceedings.¹ The primary basis of the rule is that the loss incurred is not a *taking*, even though incurring such moving costs may result in substantial hardship to the owner.² Furthermore, these costs are said to be already included in the fair market value paid,³ and are too speculative and hypothetical⁴ to be computed accurately and too expensive to compensate.⁵ Also, they are said to be only collateral and incidental to the valuation of the total take.⁶ However, courts are increasingly recognizing the harshness of this rule, and although it has not been overturned, it is more often criticized.⁷

In the thirteen year period of 1949 through 1961 there were 1,012 urban renewal projects in the United States as compared to the almost equal number of 935 projects in the six year span of 1962 through 1967.⁸ The number of highway construction contracts awarded has steadily increased from \$917,000,000 in 1947 to \$5,512,000,000 in 1967.⁹

¹ 4 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 14.2471(2) (4th ed. 1962) [hereinafter cited as NICHOLS]; 1 L. ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* §§ 66-80 (2nd ed. 1953) [hereinafter cited as ORGEL].

² See *Joslin Mfg. Co. v. Providence*, 262 U.S. 668 (1922); *Central Pac. R.R. v. Pearson*, 35 Cal. 247 (1868). But see Comment, *Eminent Domain Valuation in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957) [hereinafter cited as *Eminent Domain Valuation*], for an attack on the premise that there is a constitutional requirement only to compensate for property *taken*, to the exclusion of incidental costs such as moving expenses.

³ See, e.g., *In re Gratiot Ave.*, 294 Mich. 569, 577, 293 N.W. 755, 758 (1940). See discussion in text accompanying notes 23-31 *infra*.

⁴ See, e.g., *In re Gratiot Ave.*, 294 Mich. 569, 577, 293 N.W. 755, 758 (1940). See discussion in text accompanying notes 26-29 *infra*.

⁵ *Spies & McCoid, Recovery of Consequential Damages in Eminent Domain*, 48 VA. L.J. 437 (1962).

⁶ See, e.g., *Joslin Mfg. Co. v. Providence*, 262 U.S. 668 (1922); *Central Pac. R.R. v. Pearson*, 35 Cal. 247 (1868).

⁷ Cf. *United States v. General Motors Corp.*, 323 U.S. 373, 385 (1945) (concurring opinion); *Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 398, 153 P. 705, 707 (1915), where the court said: "We are not to be understood as saying that this should not be the law when we do say that is not our law."; *Newark v. Cook*, 99 N.J. Eq. 527, 538, 133 A. 875, 879 (ch. 1926), where the court said: "That is the law. It works hardships."

⁸ BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 714 (1968).

⁹ *Id.* at 543.

Because of this expanding condemnation activity there will be greater movement of households and greater hardship suffered by those who are displaced. It is the purpose of this note to examine the validity of the majority rule in order to determine whether California can find a reasonable and less harsh alternative.

Historical Background in the United States and England

The historical background of eminent domain compensation gives an insight into the reason for the present-day refusal of compensation for moving expenses.¹⁰ "Denial of recovery for consequential loss in eminent domain proceedings cannot be attributed entirely to history. In part it seems the product of present and conscious decision."¹¹ Yet, history has played a significant role.

Because of the rural character of early American life, condemnation did not result in the incurring of significant moving expenses.¹² Rarely did the condemnation necessitate the taking of the dwelling, as customarily there was substantial adjacent farm land that could adequately serve the project of the condemning authority.¹³ In the southern states, originally there was not even a duty to compensate *at all* for unimproved land. Its value, in relation to the obligation to the state, was said to be so small that its taking was not considered to be damage.¹⁴ The growth and development of the country necessitated the removal of all possible burdens to industrial progress.¹⁵

The situation in England was far different.¹⁶ As a by-product of

¹⁰ See 2 NICHOLS § 6.4; *Eminent Domain Valuation* 65.

¹¹ Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L.J. 437, 450 (1962).

¹² C. McCORMICK, *HANDBOOK OF THE LAW OF DAMAGES* 541 n.28 (1935): "Such damage is likely to be less important also in pioneer rural conditions than in present day urban surroundings."; Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem* 58 YALE L.J. 599, 600 (1949).

¹³ See Comment, *Real Property—Eminent Domain—Time for Fixing Damages—Super-Highway Construction*, 1 VILL. L. REV. 105 (1956):

"Many of the issues and problems which confront the courts at the present time were raised originally in the pre-Revolutionary War area of *private* turnpike construction. However, it has become apparent that the legal principles and procedural rules that were used to settle disputes in that period were not designed to cope with the problems raised by our modern urban and rural development. . . . Another source of law which might be thought applicable to the problem at hand is that which grew up with the construction of the railroads. Again, however, the rules were unsatisfactory, since most of the railroads were built through barren, undeveloped lands. . . . Modern turnpikes, on the other hand, usually cut through privately owned land which is intensely developed. . . . Hence, some new procedures are to be desired."

¹⁴ See *State v. Dawson*, 3 Hill 100 (N.Y.S.Ct. 1836); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 600 n.6 (1949); *Eminent Domain Valuation* 65.

¹⁵ See generally Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 601-02 (1949).

¹⁶ See generally 2 NICHOLS § 6.41; *Eminent Domain Valuation* 65-66.

the Industrial Revolution, land in England was more developed industrially and commercially, so that it was far more scarce and more valuable than in the United States. The English did not have extensive holdings of undeveloped land¹⁷ which could be condemned without incidental losses to the condemnee. When condemnation occurred the customary result was a displacement of a settled family or business, thereby causing greater public insistence for compensation for moving expenses. The result was a very liberal system of compensation awards that included payment of all incidental expenses, including moving costs, as well as a ten per cent award for "general inconvenience."¹⁸ The English practice was an attempt to make the condemnee *whole*, rather than to pay for what the condemnor had physically *taken*.¹⁹

The available English precedent was not followed in this country because of the different geographic, economic and industrial matrix of early America. Today the urban-rural ratio of the United States has changed²⁰ and the principle has emerged that every individual is entitled to be made whole for losses he incurred as the "price" that society must pay for progress and civilization.²¹ Moreover, an ever increasing amount of condemnation is taking place in densely populated areas for purposes such as urban development, highway construction and mass transit projects.²² Procedures established to determine compensation one hundred years ago, when the only real

¹⁷ See 1 NICHOLS § 1.22(1) at 53:

"When the settlement of the American colonies began, the situation in respect to roads was just the reverse of what it was in England. There were no roads, but the land was wholly unsettled and unimproved, and in many cases not even allotted to private ownership, so that there was no difficulty in acquiring a location for such roads. When thousands of square miles of arable land was unused and unoccupied, unimproved land, although held in private ownership, had no substantial value. No duty was at first recognized in any of the colonies to compensate the owner when a road was laid through such land, so long as that land was unimproved."

¹⁸ *Eminent Domain Valuation supra* note 2, at 66.

¹⁹ *W. Rought, Ltd. v. West Suffolk County Council*, [1955] 2 All E.R. 337 (Ct. App.).

²⁰ In 1950, 64 per cent of the population of the United States lived in urban areas; in 1960 the percentage had increased to 69.9 per cent. In California it increased from 80.7 per cent to 86.4 per cent in the same ten year period. In 1950, 89,317,000 United States residents lived in metropolitan areas and 62,009,000 lived in non metropolitan areas; in 1966 the comparative figures were 125,232,000 and 68,915,000. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 17-18 (1968).

²¹ Cf. W. PROSSER, HANDBOOK OF LAW OF TORTS § 5, at 22-23 (3rd ed. 1964), which stresses the need of compromise between the conflicting interests of certain favored industries, at a particular stage and development of society, and the protection of the individual.

²² *E.g.*, since 1947 the number of federal highway contracts have steadily increased from 917 in 1947 to 5,512 in 1967. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 543 (1968).

loss that the landowner incurred was the loss to virgin land, are inadequate for the present. Today, moving expenses of personal property may figure significantly in the total cost of the condemnation shouldered by the condemnee. In the past, however, the absence of these important considerations resulted in theories of compensation that included only payment for the market value of the property taken. The lack of popular insistence that moving costs be included also led to the exclusion of these expenses as part of the constitutionally protected interests guaranteed just compensation. Indeed, under the conditions existing at the time the majority rule was established, its application was just and did not cause hardship.

Justification of the Majority Rule

Too Hypothetical to be Included in Market Value

The most common measure of just compensation for property taken in a condemnation proceeding has been the fair market value formula, by which "every element which affects the value and which would influence a prudent purchaser should be considered."²³ The formula is on the whole quite useful since it is based on a readily ascertainable standard for determining compensation. However, it does not entirely embody the nebulous requirement of "just" or "full" compensation. It serves merely as a means to implement the constitutional requirement, if the circumstances are such that fair and just compensation does result.²⁴

When the fair market value formula does not fully compensate the landowner for the property taken it should be either discarded or modified. Thus, in one case the court said:

This court and many others have often said that the measure of damages is the market value of the property condemned . . . and this is undoubtedly the general rule, but this court has never held that the rule is without exception and that cases may not arise where a proper observance of the constitutional provision that private property shall not be taken or damaged for public use without just compensation may not require the payment of damages actually sustained other than those measured by the value of the property taken. . . . But may not cases arise where the cost of removal of personal property from the premises taken, and injury thereto, would exceed the value of the property taken? . . . Let it be supposed that the fair market value of a certain piece of real estate sought to be condemned is of itself of but small value, but that the property is occupied by the owner as the site of a costly manufacturing plant, is covered with valuable and complicated machinery, and that such machinery could not be removed except at an expense greater than the value of the premises; must the owner accept the value of the premises, and expend the amount received and an additional sum in removing and repairing his

²³ 4 NICHOLS § 12.1, at 4, 5.

²⁴ *United States v. Cors*, 337 U.S. 325 (1949), where the court looked at market value not as compensation *per se*, but as a criterion for striking a balance between the public need and the condemnee's loss.

machinery?²⁵

Outside of these unique circumstances that necessitate breaking away from the fair market value formula, it appears that the formula does not compensate for moving costs in the normal situation. In making up the market value, all existing facts that enter into the value of the land in the public estimation and tend to influence the minds of sellers and buyers may be considered, so long as they are not based on conjectural, hypothetical, or speculative assumptions.²⁶ The hypothetical and speculative nature of moving costs has been cited as a reason for their exclusion as a separate item.²⁷ These same hypothetical characteristics would likewise keep moving costs from being reimbursed through the market value formula if they should enter the formula on economically sound principles.

One way in which moving costs could be included in the market value consideration would be to deny that they are conjectural. It has already been recognized, even by courts, that they can be ascertained with reasonable certainty.²⁸ Furthermore, they are clearly not more conjectural than countless other unknown factors that determine fair market value.²⁹ A more basic question is whether there is a proper economic basis for including moving costs in the market value formula. The courts that use the market value formula—basically a test of how much a willing buyer would pay a willing seller—neglect to consider the reluctance of the prospective buyer to pay the increased price that the seller will demand, as necessitated by the added removal costs for which the seller will desire remuneration.³⁰ This is

²⁵ *Metropolitan W.S.E.R.R. v. Siegel*, 161 Ill. 638, 647, 44 N.E. 276, 280 (1896) (emphasis added).

²⁶ *Joint H'way Dist. No. 9 v. Ocean Shore R.R. Co.*, 128 Cal. App. 743, 18 P.2d 413 (1933).

²⁷ *E.g., In re Grantiot Ave.*, 294 Mich. 569, 577, 293 N.W. 755, 758 (1940); see 4 NICHOLS § 14.2471(2).

²⁸ *Los Gatos v. Sund*, 234 Cal. App. 2d 24, 28, 44 Cal. Rptr. 181, 184 (1965), stated that "[w]e are mindful of appellants' argument that moving costs, at least, could be ascertainable with reasonable certainty, thus eliminating the speculative feature which has been a reason against their allowance." C. McCORMICK, *HANDBOOK OF THE LAW OF DAMAGES* 539 n.14 (1935), says that "[t]he suggestion . . . is that there is uncertainty in that different owners would move different distances. This seems hypercritical. The actual cost of any move within a reasonable ambit is a criterion which offers little difficulty on the scope of uncertainty."

²⁹ *E.g., Shoemaker v. United States*, 147 U.S. 282 (1892); *Sacramento S. Ry. Co. v. Heibron*, 156 Cal. 408, 104 P. 979 (1909) (potential use of property condemned). 4 NICHOLS § 12.32, at 218, states that "[i]t must, however, be remembered that market value is *always* based upon hypothetical conditions." (Emphasis added).

³⁰ The court in *Harvey Textile Co. v. Hill*, 135 Conn. 686, 67 A.2d 851 (1949), used the market value approach to grant the condemnee moving costs on the theory that such moving costs would always enter the bargaining between the willing seller and the willing buyer and hence be compensated through the market value. For an unequivocal repudiation of the case, see

especially true if there is similar vacant property available. Furthermore, the buyer also has moving costs which, if taken into consideration, would neutralize the expenses to the seller. Therefore, the "willing seller-willing buyer" test does not provide relief; the willing buyer would not pay the seller's moving costs in the normal free market under which the fair market value is determined.³¹ All this leads to the conclusion that a strict adherence to the market value formula will not remove the harshness caused by a refusal to compensate for moving costs. Another approach is needed.

Compensation Not Guaranteed By Constitution

It has been argued that there is a constitutional limitation that restricts the discretion of the judiciary in its determination of what is "compensation."³² While it is true that compensation for moving costs is not compensation for property *taken*, it does not follow that these costs do not increase the amount of the condemnee's loss. "In other words, just compensation in the constitutional sense is what the

Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 420-21, 281 P.2d 707, 719-22 (1955). See 1 ORGEL § 70; C. McCORMICK, HANDBOOK OF THE LAW OF DAMAGES 541-42 (1935): "But courts have frequently said that loss of good will, loss of business, and inconvenience from interruption, and cost of removal also influence market value. Market value being either the actual current price for like property or the hypothetical price at which a willing seller and a willing buyer would meet each other's demands, can we say that market value would be affected by these costs, so that a jury should be instructed to consider them in estimating such value? It is suggested that a seller would be unwilling to sell except at a price which could cover, not merely the amount at which he valued the land and buildings, but the incidental losses of business and the expense and inconvenience which would result from the breaking up his establishment. It is submitted, however, that this does not stand the test of sound economic theory. Regardless of the desires of the seller, the purchaser will seek in the market the property which meets his needs at the lowest price. In most instances, buildings temporarily vacant, or occupied by tenants who are intending to vacate, which are suitable to the purchaser's requirements, will be offered to him. These other sellers will have no motive to demand a price which will cover the losses incidental to removal, for the sale by them would have no such effect. They can afford to offer their property at a price which includes no such items, and presumably they will do so. Presumably, therefore, the purchaser will offer our seller, who is facing removal expenses, no more than such purchaser would pay for other equally desirable property. Consequently, it seems that, except in the unusual instance of property which would be in demand from purchasers who could not, because of an absence of available vacant property, supply their needs except by buying land occupied by going business establishments, the incidental losses mentioned cannot property be awarded, or even considered, as an element of market value."

³¹ See Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 281 P.2d 707 (1955).

³² Cf. 4 NICHOLS § 14.2471(2), at 670.

owner has lost, and not what the condemnor has gained."³³

It would seem that "just compensation" is such a broad social concept that it could encompass any element leading to substantial justice in eminent domain proceedings. Accordingly, the United States Supreme Court has rejected restrictions upon the concept of "just compensation":

The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined.³⁴

This would seem to remove sufficiently any constitutional restrictions to the granting of moving expenses except that such expenses be found to be within the substantial limits of "justice." Furthermore, even if the courts interpret "just compensation" as not encompassing moving expenses for personal property, the Supreme Court has ruled that legislative bodies are competent to enlarge the judicial interpretation of just compensation for property taken.

[W]hile the legislature was powerless to diminish the constitutional measure of just compensation . . . no rule . . . stands in the way of an extension of it, within the limits of equity and justice, so as to include rights otherwise excluded. . . . It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law.³⁵

Compensation Is Too Expensive

Although generally suppressed as a reason for their denial, the practical objection of excessive expense to the condemning authority may overshadow all other reasons for a denial of moving expenses. This has been suggested as *the* reason for the denial of moving expenses,³⁶ as the allowance of moving costs allegedly would put a brake

³³ 4 NICHOLS § 12.21. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189 (1910); *State v. La Macchia*, 41 Cal. 2d 738, 264 P.2d 15 (1953).

³⁴ *United States v. Cors*, 337 U.S. 325, 332 (1949). See also *Idaho-Western Ry. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 20 Ida. 568, 119 P. 60 (1911) (compensation for a college campus); *First Parish v. Middlesex County*, 73 Mass. (7 Grey) 106 (1856) (compensation for a church); *Jacksonville Expressway Authority v. Henry G. DuPree Co.*, 108 So. 2d 289 (Fla. 1959), further explained that the theory and spirit of the constitutional requirement of full or just compensation for appropriation of private property is one requiring a practical attempt to make the owner whole; a person who is put to expense through no desire or fault of his own can only be made whole when his reasonable expenses are included in compensation. This is a drastic change from the holding of one of the earliest cases that determined compensation, *Commissioners of Momochitto River v. Withers*, 29 Miss. 21 (1855). In *Withers* the court described compensable property as needing to be "of a specific, fixed and tangible nature, capable of being had in possession and transmitted to another, as houses, lands, and chattels." *Id.* at 32.

³⁵ *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 676-77 (1923).

³⁶ *Spies & McCoid, Recovery of Consequential Damages in Eminent Domain*, 48 VA. L.J. 437, 450 (1962).

on many public projects that require the exercise of the eminent domain power.

Since there is a dearth of available material on moving expenses actually paid,³⁷ it is difficult to deny the possibility that the payment of these expenses may result in excessive claims on condemners. One report has considered the actual costs of moving, however, and its findings are noteworthy. Under a federal statute, up to 25 percent of the fair market value of the condemned parcel of land is allowed for moving expenses of personal property.³⁸ Under this federal authority

[t]he Southern California office of the United States Army Corps of Engineers had handled approximately 200 cases since the inception of the moving cost reimbursement program. The average of resettlement payments made by that office in these cases is between three and four per cent of the acquisition cost, i.e., the appraisal value of the properties acquired. This is an over-all average for farm, business, residence and industrial acquisitions. Approximately 90 per cent of the payments were less than \$500. . . . There has been only one instance when the claims for moving expenses of the interestholders in the acquired property exceeded the 25 per cent limitation.³⁹

Thus the limited statistics available do not bear out the fear of greatly increased condemnation costs. Undoubtedly there would be some increase in the costs to the taxpayer, but it does not seem that the added costs would equal the hardship incurred by a small sector of the population that suffer noncompensable losses for moving expenses because of condemnation activities.

The Particular Plight of the Tenant

When the party that will incur moving costs is a lessee whose leasehold interest has been condemned, reimbursement for such expenses is denied on the rationale that eventually, at the expiration of his lease, the tenant would have had to move anyway.⁴⁰ Courts also argue that moving expenses are merely one of the liabilities assumed by placing personal property on leased premises.⁴¹ Thus, the condemnation action affects only the time at which such costs must be incurred, rather than actually causing the expense to be incurred.

³⁷ It is extremely difficult to obtain digested statistics of reimbursement for property taken. Perhaps part of the difficulty stems from the numerous agencies on federal, state, regional, and city levels that carry on eminent domain proceedings.

³⁸ Act of July 14, 1952, ch. 726, § 401(b), 66 Stat. 606, 624.

³⁹ 3 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, & STUDIES C-22 (1960).

⁴⁰ *In re Smith St. Bridge*, 234 App. Div. 583, 588, 255 N.Y. Supp. 801, 808 (1932). An interesting argument is made in 36 ORE. L. REV. 180 (1957), claiming that the general law that denies the fee owner compensation for moving expenses for personal property arose out of a misapplication of the rule relating to leasehold interests.

⁴¹ *Springfield Sw. Ry. v. Schweitzer*, 173 Mo. App. 650, 158 S.W. 1058 (1913), contains a comprehensive review of the various reasons given for denial to owners of leasehold interests.

Regardless of the outward validity of this rationale, however, the basic requirement of just compensation for *property taken*, whether this property be leasehold or not, is not satisfied if the lessee is required to shoulder the payment of these moving costs himself. The requirement of just compensation for property taken is focused upon the loss to the condemnee rather than the taking by the condemnor. On this basis there is no distinction between costs incurred by the tenant and those incurred by the land owner.⁴² The exception would be when the tenant was already under an obligation to move because of the terms of his lease before notice of the condemnation was given by the condemnee.

Moreover, it is not always true that the owner of a leasehold interest would have to move eventually and that the taking, therefore, merely changes the time at which such expenses would be incurred. The tenant may never have had to move but for the condemnation proceeding, and to rely on the assumption that he would have had to move eventually seems fallacious. Renters and lessees are inconvenienced by condemnation as are land owners, and their expenses are no less real.

It should be noted that if the costs of moving early due to condemnation are greater than they would have been otherwise, the majority view is that the lessee has no right to compensation, not even to the extent that those early-moving costs exceed moving costs that would normally have been incurred.⁴³ The denial of admitted additional expenses in such a case could not be based on the assumption that the moving expenses would have been incurred eventually upon completion of the leasehold estate. Rather, the denial would seem to stem from the general reluctance to compensate for moving expenses.

Growing Minority View

In this decade there has been a movement toward making moving expenses compensable, usually by enacting legislation allowing them as part of the condemnation award. Pennsylvania "presents one of the most comprehensive and well-thought-out statutory schemes in this area"⁴⁴

The person having legal possession shall be entitled to, as damages, the reasonable moving expenses for personal property other than machinery, equipment or fixtures, not to exceed five hundred dollars (\$500), when personal property is moved from a place of residence and not to exceed twenty-five thousand dollars (\$25,000) when personal property is moved from a place of business. Receipts therefor shall be prima facie evidence of reasonable moving expenses. A

⁴² Committee on Condemnation Law, *Basis of Condemnation Awards*, 1 REAL PROP., PROBATE AND TRUST JOURNAL 381, 398 (1966), queries this distinction: "Another curious distinction is made in Florida, where it has been held that an owner may recover the costs of moving, whereas a lessee could not."

⁴³ *In re New York Cent. R.R.*, 42 N.Y.S.Ct.R. 306 (Hun 1885).

⁴⁴ ABA REAL ESTATE, PROB. & TRUST L. PROC. pt. II, at 53 (1965).

tenant shall be entitled to recover these moving expenses even though he is not entitled to any of the proceeds of the condemnation. In no event shall such expenses exceed the market value of such personal property.⁴⁵

Along with Pennsylvania's 1964 statutes, Massachusetts,⁴⁶ Minnesota,⁴⁷ Nebraska,⁴⁸ Washington,⁴⁹ and Wisconsin,⁵⁰ have, by broad statutes, provided for the compensation of moving expenses. In Minnesota, compensation for moving expenses has not been phrased as a matter of *right*, but as a *discretionary* action by the commissioners of the particular condemning agency.⁵¹ In addition, while New York has no broad statute providing for compensation of moving expenses in all eminent domain proceedings, it does have provisions in specific codes which *allow* compensation but do not make the payment obligatory.⁵²

The statutory approach of the above states has undoubtedly served to provide more adequate compensation. However, all these statutes have had serious quantitative limitations that are not realistic in light of the actual expenses of moving personal property. Furthermore, as noted, not all the statutes make compensation obligatory, and some apply only to fee owners or to tenants with an extended lease.

In addition to those states attempting to provide for the payment of moving expenses by statute, there are states that have approached

⁴⁵ PA. STAT. ANN. tit. 26, § 610 (Supp. 1967).

⁴⁶ MASS. GEN. LAWS ANN. ch. 79, § 6A (Supp. 1967), provides reasonable compensation for moving expenses *within the commonwealth*, but not in excess of \$3,000.00 from a place of business and \$200.00 from a place of residence. This provision is strengthened by a 1967 amendment making the granted compensation not subject to attachment by trustee process or otherwise, nor subject to be taken by execution or other process. *Id.* ch. 162, § 1 (Supp. 1967).

⁴⁷ MINN. STAT. § 117.20(8b) (1965), provides for damages for moving expenses, but not to exceed \$3,000.00 for non residential property and \$200.00 for residential property.

⁴⁸ NEB. REV. STAT. § 76-710.01 (Supp. 1965), merely says "such damage shall include . . . the reasonable cost of any necessary removal of personal property from real estate being taken. . . ." There appears to be no limitation of any type.

⁴⁹ WASH. REV. CODE ANN. § 8.25.040 (Rev. Supp. 1967), provides for reasonable removal costs not to exceed \$10,000.00 for business property and \$500.00 for residential property, if the amount of reimbursement does not exceed the cost of moving one hundred miles from the point of displacement.

⁵⁰ WIS. STAT. ANN. § 32.19(2) (1964), provides for removal costs not to exceed \$2,000.00 from non residential sites and \$150.00 from places of residence. Leasehold interests, however, are not allowed compensation unless they are written for a remaining term of three years.

⁵¹ MINN. STAT. § 117.20(8b) (1965).

⁵² *E.g.*, N.Y. CANAL LAW § 40(12b) (McKinney Supp. 1968); N.Y. H'WAY LAW § 29(13b) (McKinney Supp. 1966), which provides for reasonable reimbursement not to exceed \$25,000.00 in cases of commercial property and \$300.00 in cases of residential property. These statutes apply only to personal property and not to removable fixtures.

the problem by judicial decision. The Connecticut decision of *Harvey Textile Company v. Hill*⁵³ allows reimbursement for all moving expenses "on a rather unusual theory."⁵⁴ It was argued in *Harvey Textile* that a willing seller would always take into account the cost of moving personal property in arriving at the market value at which he would sell, and therefore such costs should be included in the award. Although this decision was a valiant attempt at compensating for the real injury of the condemnee, the theory used seems not only unusual, but fallacious. Admittedly the court had more leeway in reaching this decision since the relevant Connecticut statute speaks of compensation for all *damages*, rather than for property *taken*.⁵⁵ But the economic soundness of the inclusion of these costs in market value is doubtful, as has been pointed out, since regardless of the desires of the seller, the buyer will seek similar property that meets his needs at the lowest price.

As recently as 1959, Florida adopted the minority rule in the leading case of *Jacksonville Expressway Authority v. Henry G. Du Pree Company*⁵⁶ where, without a statute, moving expenses were allowed as a separate item outside of market value. The court argued that market value is not the exclusive standard, but merely a tool to assist in the determination of full compensation.⁵⁷ The court looked into the theoretical basis for full and just compensation and concluded that

[t]he theory and spirit of the constitutional requirement of full or just compensation for appropriation of private property requires a practical attempt to make the owner whole. A person who is put to expense through no desire or fault of his own can only be made whole when his reasonable expenses are included in compensation.⁵⁸

Decisions in other jurisdictions have allowed moving expenses sporadically, but their strength has been diminished by reliance on particular

⁵³ 135 Conn. 686, 67 A.2d 851 (1949).

⁵⁴ Committee on Condemnation Law, *Basis of Condemnation Awards*, 1 REAL PROP. PROB. & TRUST J., 381, 398 (1966).

⁵⁵ CONN. GEN. STAT. REV. § 1528 (1930); CONN. GEN. STAT. REV. § 2264 (1949). To rest this decision on the particular wording of the statute is not totally convincing, however, since the court used moving costs to *determine* market value, not as an added factor. *Harvey Textile Co. v. Hill*, 135 Conn. 686, 67 A.2d 851 (1949). Regardless of what goes into its determination, market value is the function of measurement that is followed in most states whether the statute allows compensation for property "taken" or "damaged". 4 NICHOLS § 12.1, at 4, 5. If, on the other hand, the moving costs had been allowed as a separate factor, the reliance on the particular wording would have more basis.

⁵⁶ 108 So. 2d 289 (Fla. 1959). *But see* *Gross v. Ruskin*, 133 So. 2d 759 (Fla. App. 1961); *Romy v. Dade County*, 114 So. 2d 8 (Fla. App. 1959); *Orange State Oil Co. v. Jacksonville Expressway Authority*, 110 So. 2d 687 (Fla. App. 1959).

⁵⁷ 108 So. 2d at 291.

⁵⁸ *Id.* at 292.

constitutional or statutory language,⁵⁹ or by special circumstances.⁶⁰

California Law

California has always followed the majority rule that neither tenants nor owners are entitled to reimbursement for moving costs.⁶¹ The decisions have adhered very closely to the market value formula: "Where private property is taken for a public use, it is *universally* agreed that the compensation required is to be measured by the market value of the property taken."⁶²

There has been some movement away from the inflexible rule by later decisions stating that market value is not synonymous with just compensation, and that it is not the exclusive standard for computing just compensation.⁶³ These cases affirm that just compensation is the goal, but hold further that where the rigid application of a settled rule does not work toward that goal, there must be a departure from the rule to accommodate the circumstances of the case. Thus it would seem that the door was left open for the inclusion of moving expenses in the condemnation award. The 1965 decision of *Los Gatos v. Sund*,⁶⁴ however, refused to take the opportunity made available by those earlier cases, but shut the door to any judicial relief by saying "we believe . . . this argument is one to be addressed to the Legislature. . . . [I]t is not for us to change the established law."⁶⁵

California is no longer burdened with the argument that moving costs are too speculative and hypothetical to be considered for compensation. This is one aspect of the confusion that the *Los Gatos* decision resolved by stating: "[W]e are mindful of appellants' argument that moving costs, at least, could be ascertained with reasonable certainty, thus eliminating the speculative feature which has been a

⁵⁹ See *Richmond v. Williams*, 114 Va. 698, 77 S.E. 492 (1913), where the statute allowed compensation for land taken "or other property"; Annot., 69 A.L.R. 2d 1445 (1960), where the cases are collected.

⁶⁰ E.g., *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (temporary taking).

⁶¹ *Central Pac. R.R. v. Pearson*, 35 Cal. 247 (1868); *Los Gatos v. Sund*, 234 Cal. App. 2d 24, 44 Cal. Rptr. 181 (1965); *La Mesa v. Tweed & Gambrell Mill*, 146 Cal. App. 2d 762, 766, 304 P.2d 803, 811 (1956); *Los Angeles County v. Signal Realty Co.*, 86 Cal. App. 704, 712, 261 P. 536, 539 (1927).

⁶² *Rose v. State*, 12 Cal. 2d 713, 737, 123 P.2d 505, 519 (1942) (emphasis added).

⁶³ *Citizens Util. Co. v. Superior Court*, 59 Cal. 2d 805, 826, 382 P.2d 356, 364, 31 Cal. Rptr. 316, 324 (1963); *Napa Union High School Dist. v. Lewis*, 158 Cal. App. 2d 69, 322 P.2d 39 (1958).

⁶⁴ 234 Cal. App. 2d 24, 44 Cal. Rptr. 181 (1965). The very early California decision, *Central Pac. R.R. v. Pearson*, 35 Cal. 247 (1868), likewise left the matter of compensation other than strict market value, in the hands of the legislature. It is understandable, therefore, that no court has created a judicial remedy for moving expenses.

⁶⁵ 234 Cal. App. 2d at 28, 44 Cal. Rptr. at 184.

reason against their allowance. . . ."⁶⁶ Granted this was only an oblique acceptance of the argument that moving costs are real costs; nevertheless, it was still a step in the right direction.

California Statutory Changes

In the last two years California has enacted some measures to ease the burden of the condemnee. Government Code sections 15,950-56 allow compensation for the "reasonable and necessary moving expenses"⁶⁷ incurred when property is taken by either the Department of Water Resources or the Department of Parks and Recreation. In the case of household moving expenses, a ceiling of \$200 is set by the statute.⁶⁸ The promulgation of rules and regulations necessary to implement these payments is left to the discretion of the Department of Public Works and the Board of Control.⁶⁹ A similar provision is made for reimbursement of moving expenses of condemnees displaced by action of the State Highway Department in Streets and Highways Code section 103.9. The same \$200 ceiling is placed upon household moving expenses, and the act is subject to the same discretionary management by the Highway Department as were the Government Code provisions. A better reasoned approach is provided by sections 29,110-17 of the Public Utilities Code which require that "the district *shall* compensate eligible persons for their reasonable and necessary moving expenses caused by their displacement from real property acquired for such project."⁷⁰ There is also a monetary ceiling of \$200 in cases of the movement of a household under this provision.⁷¹

Section 33,135 of the Health and Safety Code allows some further relief from the hardships caused by the relocation of persons displaced by government action (which would normally arise from eminent domain proceedings). It provides that "an agency may, with the approval of the Legislative body, provide relocation assistance to persons displaced by governmental action, and aid and assistance to property owners in connection with rehabilitation loans and grants."⁷² It does appear, therefore, that there has been at least a recognition of the existence of such customary hardships in these relocation situations for which some sort of general compensation is needed. This statute is merely a broad guideline (if even that) of "relocation assistance"; it is not a comprehensive program that is self-executing, but, rather, one that operates on an *ad hoc* basis, requiring the advance approval of the legislative body. It would therefore function at the whim of each project and each legislature. Further, and most fundamental, there is no mandatory requirement of compensation once com-

⁶⁶ *Id.*

⁶⁷ CAL. GOV'T CODE § 15,951.

⁶⁸ *Id.* § 15,953.

⁶⁹ *Id.* § 15,956.

⁷⁰ CAL. PUB. UTIL. CODE § 29,111.

⁷¹ CAL. PUB. UTIL. CODE § 29,113.

⁷² CAL. HEALTH & SAFETY CODE § 33,135 (emphasis added).

pensation is adjudged allowable.

Aside from the monetary restrictions, and the fact that payments are not compulsory, there is a further disadvantage in that not all condemnation proceedings are covered.⁷³ Whether to give compensation is determined by the fortuitous factor of which agency condemns and for what project the condemnation occurs. This would seem to interject unequal treatment for different persons that have all been injured in the same manner. The better solution would be the enactment of an all-encompassing statute of the type Pennsylvania now possesses, which would allow adequate compensation for the expense of dismantling, removing, packing, loading, transporting, unloading, storing, unpacking, reassembling or installing personal property and removable fixtures.

Statutory Recommendation

It is suggested that California should enact comprehensive legislation providing for the compensation of moving costs when such expenses are necessitated by the exercise of the power of eminent domain by a public agency. Such a statute should include:

(1) A general provision allowing compensation for the actual necessary⁷⁴ costs of moving personal property to another location.

(2) A maximum limit of 50 miles' reimbursable transportation expenses.⁷⁵ The condemnee could, of course, move further, but only at his additional expense.

(3) No quantitative restriction on the allowable expenses, except in the form of a percentage of the reasonable market value of the personal property affected.⁷⁶

(4) No distinction between fee owners and owners of leasehold interests unless there existed written documentation that the lease-

⁷³ If the condemnation does not fall under one of the selected codes, i.e., California Street and Highway Code or California Health and Safety Code, there is no remedy to the condemnee for the recovery of his moving expenses.

⁷⁴ A provision for actual costs incurred would be more desirable than a provision for reasonable costs. Recovery under "reasonable" costs would necessitate a subjective appraisal and it would give the condemnee an opportunity to make a profit on the necessitated moving.

⁷⁵ Such a provision would enable the displaced person to have a large area of choice within the geography of his former home. A 50-mile radius can cover movement within any large metropolitan area and still allow movement to a rural area, if such is the need.

⁷⁶ Since moving expenses for personal property are *roughly* a function of the value of the condemned property, this would be the most desirable way of compensation. Any fixed dollar ceilings would not allow fair compensation for those condemnees who have valuable personal property that is difficult to move. A fixed percentage would further enable the condemning agency to accurately determine the maximum cost of condemnation. A 25 percent figure would adequately cover the major part of the moving expenses. See text accompanying note 28 *supra*.

holder (of whatever kind, even at will) had been informed prior to the condemnation that his leasehold interest would be terminated lawfully. Lawful *occupation* would serve as the criterion for receipt of payment for moving expenses.

(5) Reimbursement for all moving and relocation expenses in cases of temporary takings after which term the condemnee would be allowed to return to possession.⁷⁷ These expenses would be greater since they would include costs of moving out, relocating in another area (or storing for a temporary period), and then moving back to the original premises.

(6) A statutory resolution that the determination of market value by the court or by the condemning authority does not include moving expenses.⁷⁸

While it cannot be denied that the enactment of such a general statute would increase total costs of condemnation, the added costs would provide a more fair and constitutional compensation by including losses that oftentimes are greater even than the physical loss of the property itself. To classify moving expenses as *damnum absque injuria* imposes an inordinate proportion of the expense for public projects on a few individuals. It is doubtful that allowance of moving expenses would put a stop to governmental activity by making it too costly.⁷⁹ More importantly, the scope of just compensation, of which moving expenses is only one factor, is basically a question of policy and practicalities that can best be answered by legislative action.

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⁷⁷ This has been the case law in the federal courts since *United States v. General Motors Corp.*, 323 U.S. 373, 383 (1945).

⁷⁸ There would be no fear of double payment, that is, payment as a separate item and as a factor or market value.

⁷⁹ See text accompanying note 28 *supra*.

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